

**THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

**Leo Pellegrino**, a/k/a Leo P,  
Philadelphia, Pennsylvania,

Plaintiff,

v.

**Epic Games, Inc.**,  
620 Crossroads Boulevard  
Cary, North Carolina 27518

Defendant.

Case No.

**Complaint**

**Demand for Jury Trial**

Plaintiff Leo Pellegrino, aka Leo P (“Plaintiff” or “Pellegrino”), by and through his undersigned counsel, asserts the following claims against Defendant Epic Games, Inc. (“Epic” or “Defendant”), and alleges as follows:

**I. OVERVIEW**

1. Epic has improperly exploited Pellegrino’s protected and valuable likeness and trademark, without his consent or authorization, by misappropriating Pellegrino’s highly popular signature movements with his saxophone (the “Signature Move”) for the smash hit video game Fortnite Battle Royale (“Fortnite”).

2. Pellegrino, also known by the alter ego and stage name “Leo P,” is a professional baritone saxophone player and member of the “brass house” group “Too Many Zooz.”

3. Drawing from his unique physical attributes, Pelligrino created the Signature Move, which exploded in popularity following a 2014 YouTube video that demonstrates Pellegrino engaging in his Signature Move while playing the saxophone

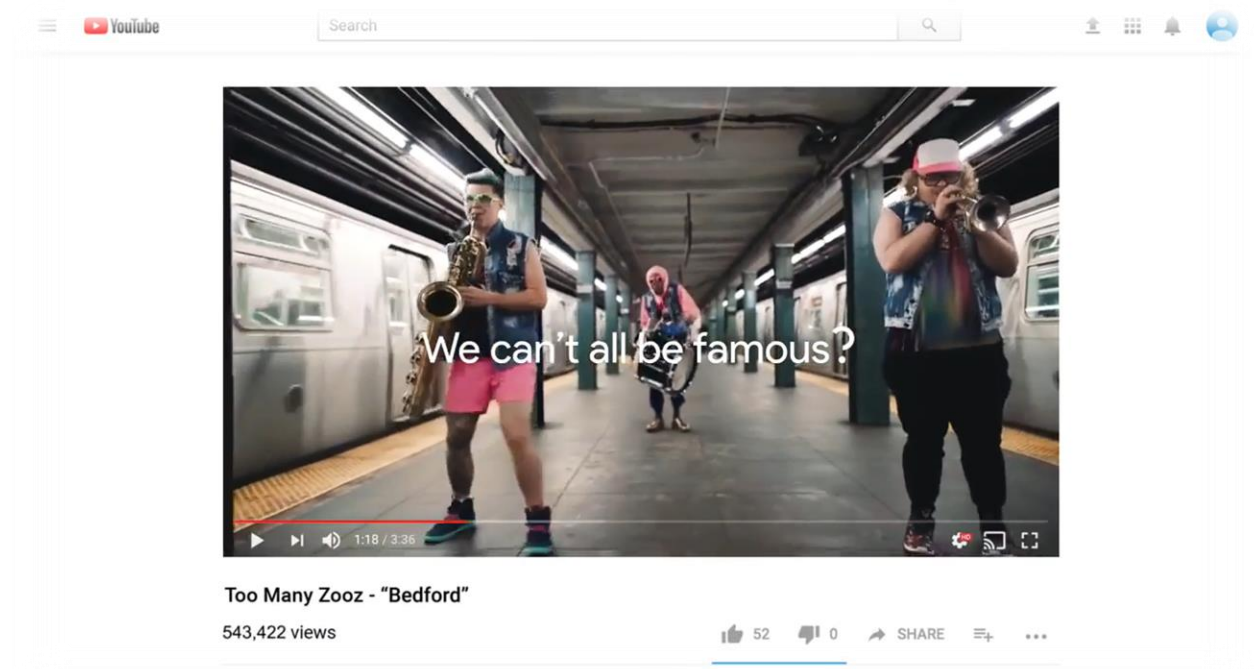
in a New York City subway station performance.<sup>1</sup> Through concert and festival performances in front of hundreds of thousands and online videos with millions of views, the Signature Move has become inextricably linked to Pellegrino and has continued to be a part of his celebrity persona.

4. Epic capitalized on Pellegrino's celebrity and the Signature Move's popularity by selling the Signature Move to players of Fortnite in Fortnite's electronic store-front as an "emote." Once purchased, Fortnite players were then able to customize their in-game avatars to execute the Signature Move while in the Fortnite universe. This in-game dance was immediately recognized by players and media worldwide as Leo P's Signature Move. A picture of Fortnite's electronic store-front offering the Signature Move is below:



<sup>1</sup> See, "The hottest thing in NYC music is these subway buskers," NY Post (Apr. 17, 2014), available at <https://nypost.com/2014/04/17/nyc-buskers-too-many-zooz-become-latest-internet-sensation/> (last accessed Apr. 22, 2019).

5. The name “Phone It In” alludes to Pellegrino’s appearance in a Google Pixel 2 phone commercial in 2017.<sup>2</sup> A screenshot from the commercial is reproduced below:



6. Epic did not credit Pellegrino or seek his consent to exploit, use, or sell Pellegrino’s Signature Move, likeness, or trademark for use in Fortnite.

7. Since being released in or around September 2017, Fortnite has become one of the most popular video games ever. It was recently reported that Epic earned \$3 billion in profits in 2018, fueled by the success of Fortnite. Indeed, following Fortnite’s inclusion of the “Phone It In” emote in December 2018, Fortnite enjoyed the “biggest month ever for a video game.” As a free-to-play game, Fortnite derives its sales exclusively through electronic store-front purchases, including through the sale of emotes such as “Phone It In.”

<sup>2</sup> Too Many Zooz: “Warriors” (Google Pixel 2), available at <https://www.youtube.com/watch?v=vbBa1cVj36U> (last accessed April 22, 2019).

8. Epic should not be able to profit from Pellegrino's strenuous work and hard-earned fame by its intentional misappropriation of Pellegrino's likeness and trademark. Epic cannot increase the value of its main product by faking endorsements by celebrities. Accordingly, Pellegrino seeks injunctive relief and damages, including, but not limited to, Epic's profits deriving from its improper use of the Signature Move and Pellegrino's likeness.

## **II. THE PARTIES**

9. Pellegrino resides in Philadelphia, Pennsylvania. He is better known as the popular baritone saxophone player member of Too Many Zooz and by his abbreviated name, "Leo P."

10. Epic is a North Carolina business corporation with its principal place of business at 620 Crossroads Boulevard, Cary, NC 27518. Epic is the creator and developer of the Fortnite video game franchise, which was first released in July 2017.

## **III. SUBJECT MATTER JURISDICTION AND VENUE**

11. The Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 1332 (diversity), and 28 U.S.C. § 1367 (supplemental jurisdiction).

12. There is jurisdiction in the Federal Courts for Lanham Act claims under 28 U.S.C. §§ 1331 and 1338(a), and 15 U.S.C. § 1121.

13. The District Court has supplemental jurisdiction under 28 U.S.C. § 1367(a).

14. Venue is proper in this District under 28 U.S.C. § 1391(b) because Epic's activities have caused substantial damage to Pellegrino in this District.

## **IV. FACTUAL BACKGROUND**

### **A. Leo P. and the Creation of the Signature Move**

15. Raised in Pittsburgh, Pennsylvania, Pellegrino began playing the saxophone at age 13, after playing the clarinet since age 9.

16. Pellegrino graduated from the Manhattan School of Music in 2013, after which he joined two brass-based musical groups – as an inaugural member of “Too Many Zooz” and a key member of “Lucky Chops.”

17. Pellegrino developed the Signature Move as a result of his unique anatomy. Specifically, since he was child, Pellegrino had externally rotatable feet. During his childhood, he struggled to correct his tendency to walk in a “duck footed” manner. However, because of his externally rotatable feet, he eventually developed his own unique dancing style and his signature and original movements – *viz.*, the Signature Move. As he developed his performance persona, Pellegrino incorporated the Signature Move into his performances playing the saxophone.

18. Pellegrino has depicted his Signature Move individually and as a member of musical groups in front of hundreds of thousands of fans. Videos including his performances in which he displays his Signature Move have also garnered millions of views.

19. In 2014, a subway patron released a video of Too Many Zooz’ performance in the Union Square subway station in New York City, during which Pellegrino repeatedly executed his Signature Move. The 2014 video gained great popularity on the Internet and by April 2014 the video had accumulated more than 700,000 views on YouTube.<sup>3</sup>

20. On November 2, 2016, Too Many Zooz performed with Beyoncé Knowles and others during the 50<sup>th</sup> Annual Country Music Association Awards.<sup>4</sup> As with all

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<sup>3</sup> See “The hottest thing in NYC music is these subway buskers,” NY Post (Apr. 17, 2014), available at <https://nypost.com/2014/04/17/nyc-buskers-too-many-zooz-become-latest-internet-sensation/> (last accessed Apr. 22, 2019).

<sup>4</sup> See “How The Band With The Dancing Sax Player Ended Up Performing With Beyoncé At The CMAs,” available at <https://www.thefader.com/2016/11/03/dancing-sax-beyonce-dixie-chicks-cma-interview> (last accessed Apr. 22, 2019).

of his performances, Pellegrino executed the Signature Move during that performance.<sup>5</sup>

21. In 2017, Pellegrino was a featured artist at the BBC Proms' tribute to Charles Mingus at Royal Albert Hall, where he executed his Signature Move.<sup>6</sup> This footage has generated millions of YouTube views and his musical performance garnered critical acclaim.

22. In October 2018, Pellegrino released a video for "Sax Star" in which he displayed his Signature Move.<sup>7</sup>

23. In March 2019, Pellegrino executed his Signature Move to acclaim when Too Many Zooz performed at Vive Latino 2019, a festival in Mexico that drew approximately 70,000 attendees daily.<sup>8</sup>

24. The Signature Move evolved out of Pellegrino's rare and distinctive physical traits and his unique personal history. Pellegrino is unanimously credited with creating the Signature Move and exploiting it as his personal mark to identify himself and his performances as a saxophone player. In fact, Pellegrino executes the Signature Move at every one of his musical performances. Pellegrino has executed the Signature Move live in front of hundreds of thousands of people, and he has been streamed by millions more. As a result of the foregoing, the Signature Move is directly intertwined with, and expresses, Pellegrino's individual identity and life story and has become synonymous with Pellegrino.

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<sup>5</sup> See "Beyoncé – DADDY LESSONS Live 50<sup>th</sup> Annual CMA Awards 2016," available at <https://www.youtube.com/watch?v=KRdJaoM5KvI> (last accessed Apr. 22, 2019).

<sup>6</sup> See "Leo P – FULL Brasshouse, Moanin, Better Git It In Your Soul – Leo Pellegrino of Too Many Zooz," available at <https://www.youtube.com/watch?v=krLYZmPRtnc> (last accessed Apr. 22, 2019).

<sup>7</sup> See "Leo P – Sax Star (Official Video)," available at [https://www.youtube.com/watch?v=SaQZ\\_U2pagk](https://www.youtube.com/watch?v=SaQZ_U2pagk) (last accessed Apr. 22, 2019).

<sup>8</sup> See "Too Many Zooz – Vive Latino 2019," available at [https://www.youtube.com/watch?v=M6TD\\_kQDkFo](https://www.youtube.com/watch?v=M6TD_kQDkFo) (last accessed Apr. 22, 2019).

25. Accordingly, the Signature Move is a part of Pellegrino's identity and its unique movements readily evoke a connection to Pellegrino.

**B. Fortnite: The Most Popular Video Game Ever**

26. Even prior to releasing Fortnite, which would become among the most popular and successful video games ever, Epic had already developed two popular video game franchises: Unreal and Gears of War. Since releasing the first Gears of War game in 2006, Epic released several subsequent Gears of War video games, and the franchise has made more than \$1 billion in total sales.

27. In or around 2011, following the release of the third Gears of War installment, Fortnite began from an Epic internal video game hackathon, or a gathering of Epic developers to brainstorm ideas and create games in a short period. Although the Fortnite game was not developed during the hackathon, the idea to merge building games (*i.e.*, Minecraft) and shooter games (*i.e.*, Gears of War or Call of Duty) emerged during the hackathon.

28. On or around July 2017, Epic released the initial version of Fortnite as a paid battle-royale game (a battle royale game is a video game genre that blends the survival, exploration and scavenging elements of a survival game with last-man-standing gameplay). However, by September 2017, after PUBG Corp. successfully released worldwide a competing game, PlayerUnknown's Battlegrounds, in the same battle royale genre, Epic re-released Fortnite as Fortnite Battle Royale, but now as a free-to-play battle-royale game on the Windows, macOS, PlayStation 4 and Xbox One platforms. Epic subsequently released Fortnite on the iOS, Nintendo and Android platforms on April 2, June 12, and August 9, 2018, respectively.

29. Similar to PlayerUnknown's Battlegrounds, Fortnite utilizes the battle royale format where up to 100 players, alone, in pairs or in groups, compete to be the last player or group alive. Indeed, similar to Battlegrounds and Gears of War, in



Fortnite players use weapons and violence to eliminate the competition by attacking and shooting them.

30. As a free-to-play video game, Epic allows players to download and play Fortnite for free. Fortnite is supported by purchases made at its electronic storefront for virtual use in the game itself (“in-game purchases”). For example, players can make in-game purchases of currency, called “Vinderbucks” or “V-Bucks.” The players in turn use V-Bucks to purchase customizations for their in-game avatars, including new characters, pickaxe modifications, glider skins, clothes and “emotes” (dances or movements). Fortnite also sells “Battle Passes” or additional levels that allow the player to unlock skins, gliders and emotes unique to that Pass. Fortnite offers four pricing levels for purchasing V-Bucks:

- 1) 1,000 V-Bucks for \$9.99;
- 2) 2,500 (+300 Bonus) V-Bucks for \$24.99;
- 3) 6,000 (+1,500 Bonus) V-Bucks for \$59.99; or
- 4) 10,000 (+3,500 Bonus) V-Bucks for \$99.99.

31. There are four types of emotes: common emotes, uncommon emotes, rare emotes, and epic emotes. The rarer the emote, the more expensive or harder it is to obtain. Uncommon emotes cost 200 V-Bucks. Rare emotes cost 500 V-Bucks. And epic emotes cost 800 V-Bucks.

32. To start, Fortnite provides each player with a common emote called Dance Moves for free. Players can then obtain other emotes by purchasing and playing additional levels in Battle Passes (950 V-Bucks each) that come with emotes unique to that Pass, or by purchasing certain emotes directly with V-Bucks. On some occasions, Fortnite sells Battle Pass emotes directly, without requiring the player to purchase the Battle Pass.

33. Emotes are incredibly popular and are fundamental to Fortnite’s success. Players purchase emotes, alongside clothing and skins, to personalize their



Fortnite experience. Emotes have also become popular outside Fortnite. Professional athletes in soccer and other sports have based their celebrations on Fortnite emotes. Young adults, teenagers and children also post videos of themselves on YouTube and social media executing emotes under various hashtags, including #fortnitedance or #fortnitevideos.

34. Upon information and belief, Epic creates emotes by copying and coding dances and movements directly from popular videos, movies, and television shows without consent.

35. In addition to misappropriating Pellegrino's Signature Move, Epic has copied unique, personal and identifying movements of numerous performers, including, among others: the signature movements of Snoop Dogg from his 2004 music video, "Drop It Like It's Hot" (named the "Tidy" emote); Alfonso Ribeiro's signature movements of his famous "Carlton" dance on The Fresh Prince of Bel-Air television show (named the "Fresh" emote); the dance performed by Will Smith on the same television show (named the "Rambunctious" emote); the dance in Marlon Webb's popular "Band of the Bold" video (named the "Best Mates" emote); Donald Faison's signature dance seen on the NBC television show Scrubs (named the "Dance Moves" emote); Terrence "2 Milly" Ferguson's "Milly Rock" signature movements (named the "Swipe It" emote); James "Blocboy JB" Baker's Shoot signature movements (named the "Hype" emote); and the "Backpack Kid's" signature movements, called the "Floss" (named the "Floss" emote).

36. Upon information and belief, Epic did not seek consent or authorization to use any of these movements just as it did not seek consent or authorization to use Pellegrino's Signature Move.

37. Soon after its release, Fortnite became an international phenomenon. The game surpassed 10 million players merely two weeks after its release and

reached 125 million players by July 2018. In November 2018, Bloomberg announced that Fortnite had 200 million player accounts across all platforms.

38. Fortnite's popularity has translated into record sales for Epic. Analysts have estimated that since its release, Fortnite has generated between \$1 billion to \$2 billion in revenue through in-game purchases such as emotes. In May 2018, Fortnite broke its own record by generating approximately \$318 million in revenue, the biggest month ever for a video game. In fact, nearly 80 million people played Fortnite in August 2018. Because of Fortnite's success, Epic's estimated valuation rose from about \$825 million to about \$15 billion.

39. To attract more players and add to its ever-growing revenue, Epic will likely continue adding popular emotes to Fortnite without the artists' or creators' consent or approval.

**C. Fortnite's Unauthorized Use of the Signature Move**

40. On December 3, 2018, Fortnite released the "Phone It In" emote for purchase in the in-game store. Players can purchase the "Phone It In" emote for 800 V-bucks.

41. The "Phone It In" emote is identical to Pellegrino's Signature Move. If a Fortnite player obtains or purchases the emote, the player's avatar can execute the Signature Move during Fortnite gameplay to replicate Pellegrino and his signature mark. The reaction from many players worldwide was immediate recognition of the emote as embodying the Signature Move, while others likely believed the emote was Epic's original creation.

42. Upon information and belief, Epic intentionally developed the Phone It In emote to intentionally mimic Pellegrino performing the Signature Move.

43. Epic did not seek to obtain Pellegrino's authorization or consent for its use of his likeness and the Signature Move.

44. Moreover, Pellegrino did not give Epic express or implied consent for its use of his likeness and the Signature Move. Epic also did not compensate Pellegrino for its use of his likeness and the Signature Move for the Phone It In emote.

45. Upon information and belief, Epic added the Phone It In emote to intentionally exploit the popularity of Pellegrino and Pellegrino's Signature Move without providing Pellegrino any form of compensation.

46. Epic profited from its improper misappropriation of the Signature Move and Pellegrino's likeness by, *inter alia*: (1) selling the infringing Phone It In emote directly to players; (2) selling the Season 4 Battle Pass that contains the Phone It In emote; (3) advertising the Phone It In emote to attract additional players, including Pellegrino's fans or those persons familiar with the Signature Move, to play Fortnite and make in-game purchases; (4) staying relevant to its current players to incentivize those players to continue playing Fortnite; (5) impliedly representing that Pellegrino consented to Epic's use of his likeness; (6) erroneously causing the association of the Phone It In with the Signature Move; and (7) creating the false impression that Pellegrino endorsed Fortnite.

47. Upon information and belief, Epic uses the Signature Move and other signature movements to create the false impression that Epic created them or that the artist with whom they are associated are endorsing the game. Indeed, players have posted videos of themselves executing the "Phone It In" emote with the hashtag #fortnitedance without referencing the Signature Move or crediting Pellegrino as the dance's creator and owner. Accordingly, upon information and belief, Epic actively and knowingly directs, causes, induces, and encourages others, including without limitation its players, designers, suppliers, distributors, resellers, software developers, and repair providers, to misappropriate Pellegrino's likeness and the Signature Move.

48. Pellegrino has stated in interviews and on social media that he does not consent to or approve Epic's use of his likeness and the Signature Move for the Phone It In emote. Prominent artists, including Chancelor Bennett, known as Chance the Rapper, and Terrence Ferguson, known as 2 Milly, have also publicly disapproved of Epic's practices, and advocated for Epic sharing profits with the artists associated with these signature movements.

49. Accordingly, Epic made a fortune from unlawfully and unfairly exploiting and misappropriating Pellegrino's and other artists' likenesses and identifying marks without crediting or compensating these artists. Pellegrino thus bring this lawsuit to prevent Fortnite from further using his likeness and the Signature Move, and to recover the monies and profits rightfully owed to him.

### **FIRST CAUSE OF ACTION**

#### **(For Unauthorized Use of Name or Likeness in Violation of 42 Pa.C.S.A.**

#### **§ 8316)**

50. Pellegrino hereby repeats and realleges the allegations set forth in the foregoing paragraphs, as though fully set forth herein.

51. Upon information and belief, Epic created the Phone It In emote by capturing and digitally copying Pellegrino executing the Signature Move. Epic then utilized the digital copy to create code that, if purchased, allows player avatars to depict the Signature Move as if the avatar were Pellegrino.

52. Through its use of the Signature Move as an in-game emote that can be purchased, Epic misappropriated Pellegrino's identity. The Phone It In emote replicates Pellegrino executing his personal trademark Signature Move.

53. Epic did not seek or obtain Pellegrino's authorization or consent for its use of Pellegrino's likeness or the Signature Move for the Phone It In emote. Nor has Epic compensated or credited Pellegrino for its use of his likeness or the Signature Move.

54. Epic used Pellegrino's likeness and the Signature Move to generate significant income by: (1) selling the infringing Phone It In emote directly to players; (2) selling the Season 4 Battle Pass that contains the Phone It In emote; (3) advertising the Phone It In emote to attract additional players, including Pellegrino's fans or those persons familiar with the Signature Move, to play Fortnite and make in-game purchases; (4) using Pellegrino's fame to stay relevant to current players to incentivize those players to continue playing Fortnite; (5) impliedly representing that Pellegrino consented to Epic's use of his likeness; (6) intentionally causing the erroneous public association of the Phone It In with Pellegrino and his signature mark, the Signature Move; and (7) creating the false impression that Pellegrino endorsed Fortnite.

55. Pellegrino's likeness and personal trademark Signature Move have significant commercial value. For example, Pellegrino uses his likeness and the Signature Move to attract and delight fans of his group, Too Many Zooz, as well as to identify and advertise the group, both domestically and internationally. Individually, as the musical artist Leo P, Pellegrino's unique identity and Signature move, along with his musical talent, form the basis for his artistic persona. Pellegrino monetizes his Signature Move by depicting it during performances at concerts, events, festivals, and in videos.

56. Pellegrino was damaged by Epic's misappropriation of his Signature Move and likeness, in part by preventing him from reaping the profits of licensing them to Epic.

57. Epic's conduct caused and will continue to cause confusion and mistaken belief by leading the public to erroneously believe that Pellegrino consented to the use of his likeness and/or the Signature Move in Fortnite.

58. Pellegrino is entitled to permanent injunctive relief preventing Epic, and its officers, agents, and employees, and all related persons from further using his likeness or the Signature Move.

59. Pellegrino is also entitled to recover damages, including any profits obtained by Epic as a result of the misappropriation of Pellegrino's likeness as alleged above, in an amount according to proof to be determined at the time of trial.

60. The conduct of Epic in exploiting and misappropriating Pellegrino's likeness and the Signature Move was outrageous and inexcusable, justifying punitive damages.

## **SECOND CAUSE OF ACTION**

### **(For Misappropriation of Publicity)**

61. Pellegrino hereby repeats and realleges the allegations set forth in the foregoing paragraphs, as though fully set forth herein.

62. Pellegrino's likeness and signature mark are valuable. As musical artist Leo P, Pellegrino exploits his identity by performing at concerts, events, festivals, and in videos, which he advertises through, among other things, his personal trademark Signature Move.

63. Upon information and belief, Epic created the Phone It In emote by capturing and digitally copying Pellegrino executing the Signature Move. Epic then utilized the digital copy to create code that, if purchased, allows player avatars to depict the Signature Move as if the avatar was Pellegrino.

64. Through its use of Signature Move as an in-game emote that can be purchased, Epic misappropriated Pellegrino's valuable likeness in violation of his common law right of publicity. The Phone It In emote replicates Pellegrino executing his personal trademark Signature Move.

65. Epic did not seek or obtain Pellegrino's authorization or consent for its use of Pellegrino's likeness for the Phone It In emote. Nor has Epic compensated or credited Pellegrino for its use of his likeness or the Signature Move.

66. Epic used Pellegrino's likeness and the Signature Move to generate significant income by: (1) selling the infringing Phone It In emote directly to players; (2) selling the Season 4 Battle Pass that contains the Phone It In emote; (3) advertising the Phone It In emote to attract additional players, including Pellegrino's fans or those persons familiar with the Signature Move, to play Fortnite and make in-game purchases; (4) using Pellegrino's fame to stay relevant to current players to incentivize those players to continue playing Fortnite; (5) impliedly representing that Pellegrino consented to Epic's use of his likeness; (6) intentionally causing the erroneous public association of the Phone It In with Pellegrino and the Signature Move; and (7) creating the false impression that Pellegrino endorsed Fortnite.

67. Pellegrino was damaged by Epic's conduct because his likeness and Signature move are now associated with Fortnite and he was prevented from reaping the profits of licensing his likeness or the Signature Move to Epic.

68. Epic's conduct caused and will continue to cause confusion and mistaken belief by leading the public to erroneously believe that Pellegrino consented to the use of his likeness and/or the Signature Move in Fortnite.

69. Pellegrino is entitled to permanent injunctive relief preventing Epic, and its officers, agents, and employees, and all related persons from further using his likeness and/or the Signature Move.

70. Pellegrino is also entitled to recover damages, including any profits obtained by Epic as a result of the misappropriation of Pellegrino's likeness as alleged above, in an amount according to proof to be determined at the time of trial.



71. The conduct of Epic in exploiting and misappropriating Pellegrino's likeness and the Signature Move was outrageous and inexcusable, justifying punitive damages.

### **THIRD CAUSE OF ACTION**

#### **(For Invasion of Privacy By Misappropriation of Identity)**

72. Pellegrino hereby repeats and realleges the allegations set forth in the foregoing paragraphs, as though fully set forth herein.

73. Epic has used and appropriated Pellegrino's valuable likeness and Signature Move, without authorization, and for its own commercial advantage, in violation of his common law right of privacy.

74. The conduct of Epic in exploiting and misappropriating the likeness of Pellegrino was outrageous and inexcusable, justifying punitive damages.

### **FOURTH CAUSE OF ACTION**

#### **(For Unjust Enrichment)**

75. Pellegrino hereby repeats and realleges the allegations set forth in the foregoing paragraphs, as though fully set forth herein.

76. By using Pellegrino's likeness and identifying mark, the Signature Move, Epic has been unjustly enriched to the substantial detriment of Pellegrino.

77. Epic has retained the benefits under such circumstances as make it unjust and inequitable to retain them without paying Pellegrino the value of the benefits it unjustly acquired.

### **FIFTH CAUSE OF ACTION**

#### **(For Unfair Competition Under Common Law)**

78. Pellegrino hereby repeats and realleges the allegations set forth in the foregoing paragraphs, as though fully set forth herein.

79. By exploiting and misappropriating Pellegrino's likeness and the Signature Move through the improper use of the Phone It In emote, Epic has engaged

in business acts or practices that constitute unfair competition in violation of Pennsylvania common law.

80. Epic used Pellegrino's likeness and the Signature Move to generate significant income by: (1) selling the infringing Phone It In emote directly to players; (2) selling the Season 4 Battle Pass that contains the Phone It In emote; (3) advertising the Phone It In emote to attract additional players, including Pellegrino's fans or those persons familiar with the Signature Move to play Fortnite and make in-game purchases; (4) using Pellegrino's fame to stay relevant to current players to incentivize those players to continue playing Fortnite; (5) impliedly representing that Pellegrino consented to Epic's use of his likeness; (6) intentionally causing the erroneous public association of the Phone It In with Pellegrino and his Signature Move; and (7) creating the false impression that Pellegrino endorsed Fortnite.

81. Pellegrino has been damaged by Epic's conduct because he was prevented from reaping the profits of licensing his likeness or the Signature Move to Epic.

82. Pellegrino is entitled to permanent injunctive relief preventing Epic, its officers, agents and employees, and all related persons from further using his likeness and trademark Signature Move.

83. Pellegrino is also entitled to recover damages, including any profits obtained by Epic as a result of the misappropriation of Pellegrino's likeness as alleged above, in an amount according to proof to be determined at the time of trial.

## **SIXTH CAUSE OF ACTION**

### **(For Trademark Infringement Under 15 U.S.C. § 1125(a))**

84. Pellegrino hereby repeats and realleges the allegations set forth in the foregoing paragraphs, as though fully set forth herein.

85. Epic's unauthorized use of the Signature Move for the Phone It In emote in Fortnite constitutes infringement in violation of 15 U.S.C. § 1125(a), *et seq.*, and has caused substantial and irreparable injury to Pellegrino's reputation and goodwill. Since creating the Signature Move and performing it in the Union Square video in 2014, the Signature Move has become associated with Pellegrino's identity and persona. By virtue of Pellegrino's prominent and continuous use of the Signature Move, Pellegrino's mark has become distinctive and famous within the meaning of 15 U.S.C. § 1125(c). The Signature Move is distinct and immediately recognizable.

86. Epic used Pellegrino's likeness and the Signature Move to generate significant income by: (1) selling the infringing Phone It In emote directly to players; (2) selling the Season 4 Battle Pass that contains the Phone It In emote; (3) advertising the Phone It In emote to attract additional players, including Pellegrino's fans or those persons familiar with the Signature Move to play Fortnite and make in-game purchases; (4) using Pellegrino's fame to stay relevant to current players to incentivize those players to continue playing Fortnite; (5) impliedly representing that Pellegrino consented to Epic's use of his likeness; (6) intentionally causing the erroneous public association of the Phone It In with Pellegrino and his Signature Move; and (7) creating the false impression that Pellegrino endorsed Fortnite.

87. As a direct and proximate result of Epic's trademark infringement, Pellegrino is entitled to permanent injunctive relief preventing Epic, its officers, agents and employees, and all related persons from further using Pellegrino's identifying mark, the Signature Move.

88. Pellegrino is also entitled to recover damages, including any profits obtained by Epic as a result of the misappropriation of Pellegrino's likeness as alleged above, in an amount according to proof to be determined at the time of trial.

89. Epic's acts have been deliberate, willful, and intentional and purposeful to exploit Pellegrino's celebrity and the Signature Move mark.

90. Epic threatens to continue to advertise, promote, market, sell, and offer for sale the infringing Phone It In emote, and unless until restrained and enjoined will continue to do so to Pellegrino's irreparable damage.

91. Epic's conduct is causing and, unless enjoined and restrained by this Court, will continue to cause Pellegrino great and irreparable injury that cannot be compensated or measured in money. Pellegrino thus has no adequate remedy at law and is entitled to injunctive relief, prohibiting further infringements of Pellegrino's trademark.

92. In addition, Pellegrino has incurred costs and attorneys' fees to bring this action.

**SEVENTH CAUSE OF ACTION**  
**(For Trademark Infringement Under Common Law)**

93. Pellegrino hereby repeats and realleges the allegations set forth in the foregoing paragraphs, as though fully set forth herein.

94. Since 2014, Pellegrino has used, and thereby owns common law trademark rights in, the Signature Move. The Signature Move has acquired distinctiveness through Pellegrino's continuous and widespread use of his distinct set of movements to identify and advertise his musical performances and music videos in the United States and worldwide.

95. Epic enables its Fortnite players to have access to the Signature Move and have its characters depict the Signature Move during gameplay. Through Epic's unauthorized use in Fortnite of Pellegrino's identifying mark, the Signature Move, Epic has misappropriated Pellegrino's trademark.

96. Epic used Pellegrino's likeness and the Signature Move to generate significant income by: (1) selling the infringing Phone It In emote directly to players;

(2) selling the Season 4 Battle Pass that contains the Phone It In emote; (3) advertising the Phone It In emote to attract additional players, including Pellegrino's fans or those persons familiar with the Signature Move to play Fortnite and make in-game purchases; (4) using Pellegrino's fame to stay relevant to current players to incentivize those players to continue playing Fortnite; (5) impliedly representing that Pellegrino consented to Epic's use of his likeness; (6) intentionally causing the erroneous public association of the Phone It In with Pellegrino and the Signature Move; and (7) creating the false impression that Pellegrino endorsed Fortnite.

97. As a result of Epic's conduct, Pellegrino has been damaged by being precluded from receiving his rightful share of the profits from selling or licensing the Signature Move, his identifying mark, and his likeness.

98. Moreover, Pellegrino was damaged by Epic's conduct as he was prevented from reaping the profits of licensing the Signature Move to Epic.

99. Pellegrino is entitled to permanent injunctive relief preventing Epic, and its officers, agents, and employees, and all related persons from further using the Signature Move and/or his likeness.

100. Pellegrino is also entitled to recover damages, including any profits obtained by Epic as a result of the misappropriation of Pellegrino's likeness as alleged above, in an amount to be determined at the time of trial.

## **EIGHTH CAUSE OF ACTION**

### **(For Trademark Dilution Under 15 U.S.C. § 1125(c))**

101. Pellegrino hereby repeats and realleges the allegations set forth in the foregoing paragraphs, as though fully set forth herein.

102. By virtue of the prominent and continuous use of the Signature Move and its signature set of movements, Pellegrino's mark has become distinctive and famous within the meaning of 15 U.S.C. § 1125(c).

103. Epic's conduct dilutes the distinctive quality of Pellegrino's mark in violation of Section 43(c) of the Lanham Act, 15 U.S.C. § 1125(c).

104. Epic's conduct and actions have lessened the capacity of Pellegrino's mark, as Epic did not credit Pellegrino or seek his consent.

105. Epic's acts have been deliberate, willful, intentional, and purposeful to exploit Pellegrino's celebrity and the popularity of the Signature Move.

106. Epic continues to advertise, promote, market, sell and offer for sale the Phone It In emote, which is a copy of Pellegrino's mark, and unless restrained and enjoined, will continue to do so to Pellegrino's irreparable damage.

107. Epic's conduct is causing and, unless enjoined and restrained by this Court, will continue to cause Pellegrino great and irreparable injury that cannot be compensated or measured in money. Pellegrino thus has no adequate remedy at law and is entitled to injunctive relief, prohibiting further dilution of Pellegrino's mark.

108. In addition, Pellegrino has incurred costs and attorneys' fees to bring this action.

### **PRAYER FOR RELIEF**

#### **As to the First Cause of Action:**

1. For an order restraining Epic from using Pellegrino's likeness and/or the Signature Move in Fortnite;
2. For an award of damages according to proof;
3. For punitive and/or exemplary damages;

#### **As to the Second Cause of Action:**

4. For an order restraining Epic from using Pellegrino's likeness and/or the Signature Move in Fortnite;
5. For an award of damages according to proof;
6. For punitive and/or exemplary damages;

**As to the Third Cause of Action:**

7. For an award of damages according to proof;
8. For punitive and/or exemplary damages;

**As to the Fourth Cause of Action:**

9. For an award of damages according to proof;
10. For attorneys' fees and costs;

**As to the Fifth Cause of Action:**

11. For an order restraining Epic from using, selling, or displaying Pellegrino's likeness and or the Signature Move in Fortnite;
12. For an award of damages according to proof;

**As to the Sixth Cause of Action:**

13. For an order restraining Epic from using, selling, or displaying Pellegrino's mark in Fortnite;
14. For an award of damages according to proof;
15. For attorneys' fees and costs;

**As to the Seventh Cause of Action:**

16. For an order restraining Epic from using, selling, or displaying Pellegrino's mark in Fortnite;
17. For an award of damages according to proof;
18. For punitive and/or exemplary damages;
19. For attorneys' fees and costs;

**As to the Eighth Cause of Action:**

20. For an order restraining Epic from using, selling, or displaying Pellegrino's mark in Fortnite;
21. For an award of damages according to proof;
22. For attorneys' fees and costs;



**As to All Causes of Action:**

- 23. For costs of suit; and
- 24. For such other and further relief as the Court may deem proper and just.

**JURY DEMAND**

Plaintiff demands a jury for all issues triable to a jury.

Dated: April 25, 2019

Respectfully Submitted,

**Pierce Bainbridge Beck Price & Hecht  
LLP**

By: /s/ Andrew J. Lorin

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